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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

HONORABLE MAAME EWUSI-MENSAH FRIMPONG, U.S. DISTRICT JUDGE

CLINTON BROWN,)
)
Plaintiff,)
)
v.) Case No.
) CV 23-2972 MEMF (KSx)
EMIL ASSENTATO, et al.,)
)
Defendants.)
)

CLINTON BROWN,)
)
Plaintiff,)
)
v.) Case No.
) CV 22-9203 MEMF (KSx)
CLARK R. TAYLOR,)
)
Defendant.)
)

CLINTON BROWN,)
)
Plaintiff,)
)
v.) Case No.
) CV 23-2938 MEMF (KSx)
STEVE SMEAD,)
)
Defendant.)
)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
MOTION HEARING
THURSDAY, SEPTEMBER 21, 2023
10:26 A.M.
LOS ANGELES, CALIFORNIA

MYRA L. PONCE, CSR NO. 11544, CRR, RPR, RMR, RDR
FEDERAL OFFICIAL COURT REPORTER

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1 THURSDAY, SEPTEMBER 21, 2023; 10:26 A.M.

2 LOS ANGELES, CALIFORNIA

3 -oOo-

10:26AM

4 THE COURTROOM DEPUTY: Calling Item No. 6 on the
5 calendar, LA CV 23-02972 MEMF, Clinton Brown versus
6 Emil Assentato.

7 Counsel, state your appearances.

10:26AM

8 MR. HICKMAN: Good morning, Your Honor.
9 Fred Hickman for the defendants Steven Weera Tonasut,
10 Emil Assentato, and Trust [sic] Deed Enterprises.

11 THE COURT: Thank you.

12 MR. BROWN: Clinton Brown for Clinton Brown.

13 THE COURT: Thank you.

14 Okay. The parties may be seated.

10:27AM

15 And counsel, your name again?

16 MR. HICKMAN: Fred, F-r-e-d, Hickman, H-i-c-k-m-a-n.

17 THE COURT: Okay. And have you already provided the
18 clerk with your information? Because I don't see you -- oh. I
19 think I was looking at the wrong one.

10:27AM

20 Hickman. Okay. We have it. Great. Thank you.

21 Okay. So thank you, to both of you, for appearing
22 for this hearing. I also thank you for your patience and in
23 terms of scheduling this hearing and getting this on calendar
24 in light of the Court's busy calendar.

10:27AM

25 Mr. Brown, I did want to advise you that we realize

1 that we had one of your requests pending regarding the IFP and
2 that's now been granted. It will probably hit the docket
3 shortly.

10:27AM 4 Okay. So with that, did both of you receive the
5 Court's tentative ruling via e-mail?

6 MR. HICKMAN: Yes, Your Honor.

7 MR. BROWN: Yes, Your Honor.

10:28AM 8 THE COURT: Okay. And so I think it's explained at
9 the top of the tentative, but I'll just reiterate that the
10 tentative is truly that, it's the Court's tentative ruling.
11 It's intended to be helpful to the parties in making their
12 arguments so you have a sense of what the Court is thinking and
13 the direction the Court is going. But my mind remains open,
14 that's why I'm still having this hearing. So you shouldn't
10:28AM 15 feel like I cannot be persuaded to take another direction than
16 what's in the tentative. But I do find it's helpful for the
17 parties to have a sense of what the Court is thinking.

18 Okay. So with that, let's start with the motion to
19 dismiss. And, Mr. Hickman, since that's your motion, I will
10:28AM 20 let you be heard first and then we'll hear from Mr. Brown.

21 MR. HICKMAN: Thank you, Your Honor.

22 We have, as the tentative notes, as you note, two
23 motions to dismiss. One is for Steven Weera Tonasut. So if I
24 may address that one first.

10:29AM 25 THE COURT: You may.

1 MR. HICKMAN: I agree that Rule 9(b) is not
2 satisfied in a fraud pleading. The who, what, when, where,
3 why, the Complaint is silent about misrepresentations,
4 falsehoods, reliance on falsehoods, resulting damages from
10:29AM 5 falsehoods, and that's true for a fraud case generally that's
6 failed any fraud pleading standard.

7 The Court didn't need to reach it, it seems, or may
8 not need to reach it. It did not -- the Court did not reach
9 the heightened, the more heightened fraud pleading standards
10:29AM 10 required for a claim of violation of federal securities laws.
11 As I read the cases, it's an even more heightened fraud
12 pleading requirement for federal securities law violations than
13 it is under standard Rule 9(b) for fraud.

14 But I agree on the Rule 9(b). And perhaps the Court
10:30AM 15 doesn't need to reach the even higher standard since 9(b) was
16 not met.

17 THE COURT: And what would you point to as your
18 authority for -- your primary authority for the idea that the
19 pleading standard is even higher for securities?

10:30AM 20 MR. HICKMAN: If I may grab the brief --

21 THE COURT: Yes, please.

22 MR. HICKMAN: -- because I read the cases.

23 Your Honor, one of the cases that I briefed in both
24 the motion and the reply is -- in the reply, it's at -- for
10:31AM 25 Mr. Tonasut, it's at page 5, line -- starting at line 28 -- or

1 lines 23 through 28. *ScriptsAmerica, Incorporated, versus*
2 *Ironridge Global LLC*, 56 F.Supp.3d 1121, 1136.

3 THE COURT: Do you have any binding authority that
4 indicates that the pleadings standard for a securities law
10:32AM 5 violation is higher than the Rule 9 pleading standard?

6 MR. HICKMAN: Your Honor, no, I -- I can't say that
7 I do at the moment. If that's not set forth in the
8 *ScriptsAmerica* case and others like it, then it is not a -- it
9 would not be a higher standard.

10:32AM 10 But I -- I understood in my reading of the case law
11 that, under Rule 9, the -- the Private Securities Litigation
12 Reform Act, the PSLRA, 15 U.S.C. -- it's cited in
13 *ScriptsAmerica* -- 15 U.S.C., Section 78u-4. I had read that to
14 mean it was a higher standard because the Rule 9 fraud pleading
10:33AM 15 standard has existed since Rule 9 -- I didn't check it -- but
16 the 1930s, maybe, probably earlier, going back to the
17 beginnings.

18 And so because of the -- the problems presented by
19 excessive securities complaints, complaints that seem to be
10:33AM 20 burdening the system, Congress, as I read it, enacted that
21 Private Securities Litigation Reform Act to -- to, like, make
22 really, really sure the fraud pleading would have to be very,
23 very good.

24 And so that's all I -- I can say.

10:34AM 25 THE COURT: Understood.

1 Anything else?

2 MR. HICKMAN: Yes.

3 For Steven Weera Tonasut, I believe, the focus, as I
4 briefed but want to mention, is that Steven Weera Tonasut sold
10:34AM 5 nothing to Clinton Brown. And Clinton Brown -- on the pleading
6 and in the judicial notice, Clinton Brown bought nothing from
7 Mr. Tonasut.

8 He -- Mr. Brown did not buy an investment contract
9 from Mr. Tonasut. Mr. Brown didn't buy land from Mr. Tonasut.
10:35AM 10 Mr. Brown did not buy a promissory note from Mr. Tonasut.
11 Mr. Brown didn't buy a security from Mr. Tonasut.

12 Mr. Tonasut made a loan, and Brown and Atlas, LLC,
13 signed a promissory note taking Mr. Tonasut's money from him,
14 from him, money flowing from Tonasut to Brown and Atlas, LLC,
10:35AM 15 as purchase money secured by a deed of trust, a normal
16 encumbrance, that Atlas, LLC, gave to secure the promissory
17 note for purchase money.

18 THE COURT: And do you -- can you address -- as you
19 saw in the tentative, the -- the Court's determination was that
10:36AM 20 Mr. Brown had properly pled a security because he had properly
21 pled that the arrangement between the three entities was an
22 investment contract.

23 So I appreciate your describing that, in your view,
24 the relationship between Mr. Tonasut and Mr. Brown was that of
10:36AM 25 a loan. But can you address -- given that the Court is to

1 view -- assume that the facts as pled are true, that those
2 facts would make out an investment contract and, therefore, a
3 security. Can you address that?

10:36AM 4 MR. HICKMAN: Mr. Brown's concept, without pleading
5 facts to show it, is that they were all in it together.
6 Mr. Tonasut as purchase money lender, never a member of the
7 LLC, and Emil Assentato, a member of the LLC, and Trust [sic]
8 Deed Enterprises who took a second that it owned.

10:37AM 9 So Mr. Brown's theory without pleading facts is that
10 Mr. Tonasut's just in the whole pot together as a general
11 investment scheme. But that's not what the pleaded facts are
12 and as shown by the judicial notice. No facts are pleaded that
13 Mr. Tonasut's a member of the LLC. No facts are pleaded that
14 Mr. Tonasut managed the LLC. The only facts -- fact pleaded
10:37AM 15 are that Mr. Tonasut made a loan for purchase money for the
16 land Atlas bought.

17 And, Your Honor, a loan secured by business assets,
18 here the land bought by Atlas, LLC, is typically not a
19 regulated federal security.

10:38AM 20 And the Court also touched on sweat equity, which I
21 addressed particularly in the motion to dismiss for
22 Mr. Assentato, who is a member of the LLC, with Mr. Brown.
23 Only Brown and Assentato are -- and Trust [sic] Deed
24 Enterprises are listed members of the LLC.

10:38AM 25 And the sweat equity case law I found -- and once

1 again, this is just Emil Assentato and Trust [sic] Deed. This
2 is not Mr. Tonasut. Mr. Tonasut has no ownership interest in
3 the LLC.

10:38AM 4 Sweat equity, that someone like the 50 percent owner
5 of Atlas, LLC, Mr. Brown put in as managing member, that's not
6 the sale to him of a federal security. Sweat equity is just
7 what business owners do when they're making an effort to have a
8 business succeed.

10:39AM 9 And then on Mr. Tonasut, the straight lender,
10 sometime after the purchase money loan secured by Atlas, LLC's
11 ownership interest, Mr. Tonasut bought -- bought and paid Atlas
12 for 15 percent ownership interest in this 20-acre commercial
13 property. That's a purchase by Mr. Tonasut, not a security and
14 not part of an investment scheme. It's Mr. Tonasut of record
10:40AM 15 buying a 15 percent undivided interest in the land.

16 I -- I shift now to Mr. Assentato's motion to
17 dismiss made jointly with Trust [sic] Deed Enterprises.

18 Brown's alleged ownership interest in Atlas, LLC,
19 and Assentato and Trust [sic] Deed Enterprises together have
10:40AM 20 the other 50 percent. Our request for judicial notice showed
21 that Mr. Brown -- I don't recall if his pleading laid out their
22 respective interests. But the facts of pleading rather than
23 just a hand grenade of investment scheme they led me down the
24 primrose path of and certainly -- just kind of a cloud of smoke
10:40AM 25 thrown on their route, fact pleading -- is that Trust [sic]

10:41AM

1 Deed Enterprises owned the land before Atlas, LLC, bought it.
2 Trust [sic] Deed Enterprises owned the land. And the Court
3 took -- as in the tentative, is taking judicial notice of the
4 grant deed from Atlas, LLC -- pardon me -- the grant deed from
5 Trust [sic] Deed Enterprises to Atlas, LLC -- not Mr. Brown;
6 Atlas, LLC -- for which Atlas, LLC, only and not Mr. Brown took
7 out a loan, a seller carry-back, both from -- the promissory
8 note, of which we've requested judicial notice, the promissory
9 note made by Atlas, LLC, to Mr. Assentato and Trust [sic] Deed
10 Enterprises.

10:42AM

11 A purchase money loan, a second to buy land, a
12 secured loan against a business asset, not regarded in case law
13 I found as a federal security. It's a purchase money loan.
14 Mr. Brown didn't pay for an investment contract. Mr. Brown
15 didn't pay for an investment scheme.

10:42AM

16 THE COURT: Can I just interrupt you for a moment?

17 MR. HICKMAN: Yes.

18 THE COURT: So the -- I hear what you're saying
19 with -- with respect to Mr. Tonasut. But the Complaint alleges
20 that Mr. Brown, Mr. Assentato, and Tax Deed Enterprises signed
21 an operating agreement and -- and to form a partnership.

10:42AM

22 So if you could address -- while I hear what you're
23 saying with respect to Mr. Tonasut, that perhaps the Complaint
24 doesn't have any allegations that Mr. Tonasut or the Trust were
25 part of this operating agreement or this partnership. But can

10:43AM

1 you address, with respect to Assentato and Tax Deed
2 Enterprises, why the facts as pled in the Complaint do not
3 amount to an investment contract?

10:43AM 4 MR. HICKMAN: To form an LLC in California, which
5 this was, Atlas, LLC, a California LLC, an operating agreement
6 is required. I did request judicial notice of it.

7 It doesn't show the sale of a security to Mr. Brown,
8 and he doesn't plead facts that there is -- it is a sale of a
9 security to him. He is established as the request for judicial
10:44AM 10 notice shows. He was the managing member. He owns 50 percent.
11 Emil Assentato, my judicial notice, at 30 percent. Trust [sic]
12 Deed Enterprises at 20 percent.

13 But the -- the Secretary of State's data, which I've
14 requested judicial notice, shows that -- shows that Brown is
10:44AM 15 the managing member. Brown is in control. Brown is in full
16 control.

17 And the sweat equity that an owner puts in is not a
18 security sold to a member of an interest. Mr. Brown didn't
19 himself pay to buy his membership interest from Emil Assentato
10:44AM 20 or Trust [sic] Deed Enterprises. He didn't pay to buy it. He
21 led the setup of the LLC.

22 And so on the facts not pleaded or as pleaded, it
23 doesn't show that even participation in the LLC -- or that
24 interest in the LLC is itself a regulated security, defined
10:45AM 25 regulated security that was sold to Mr. Brown because sweat

1 equity doesn't do it. That's what every working person in a
2 business who's an owner of a business does.

3 So the LLC itself does not show that there's a
4 regulated security that was sold to Mr. Brown.

10:45AM

5 THE COURT: Thank you.

6 Was there something further?

7 MR. HICKMAN: Not unless there are questions,
8 Your Honor.

9 THE COURT: Okay. Thank you. I appreciate it.

10:45AM

10 Okay. I will hear from you, Mr. Brown.

11 MR. BROWN: Thank you, Your Honor.

12 Federal --

13 THE COURT: If you could just leave your mask on.

14 MR. BROWN: I'm sorry.

10:46AM

15 THE COURT: Thank you.

16 MR. BROWN: Yep. Federal pleading rules require
17 that there is a short and plain statement of FRCP 8. And the
18 spirit of that rule is to -- that the plaintiff make an
19 allegation, that it's considered to be true, not to include
20 conclusionary facts.

10:46AM

21 THE COURT: I'm sorry. I didn't hear the last part
22 of --

23 MR. BROWN: Conclusionary facts.

24 THE COURT: Conclusory facts. Uh-huh. Understood.

10:46AM

25 MR. BROWN: And so when it comes to the 9(b), which

1 is after 8, and with FRCP 1, the argument -- and I agree with
2 the who, what, when, where, why, how, totally. The -- in
3 respect to the chart that I created for that, you know, I think
4 that it demonstrates key facts that could be explained more. I
10:47AM 5 get that, if they're going to go for a higher pleading
6 standard.

7 But I think in light of what FRCP 8 says and also
8 the Congress's legislation that, you know, these securities,
9 they're not -- they're not simple transactions.

10:47AM 10 And so I think that for the pleading, at least, it
11 was to put it very clearly what is -- you know, happened.
12 So --

13 THE COURT: Can you address Mr. Hickman's argument
14 that, leaving aside the relationship between you,
10:48AM 15 Mr. Assentato, and Tax Deed Enterprises, there's no allegation
16 in the Complaint that Mr. Tonasut or the Tonasut Trust was part
17 of Atlas, LLC, or the operating agreement or anything other
18 than just a simple loan.

19 MR. BROWN: Well, yes, Your Honor. If you take a
10:48AM 20 look at the -- I mean, and if the -- I'm not sure if this
21 particular document was allowed but -- for judicial notice, but
22 it wasn't -- all the documents he submitted, we were not --
23 though, I'm not complaining about.

24 The Tonasut -- in order for this -- the transaction
10:48AM 25 to happen in the sale or purchase of the 15 percent share that

1 Mr. Tonasut bought, it had to have Emil's signature. He had to
2 sign off on it. And that was -- that was also in the
3 Complaint, that the -- the -- that he was, you know, involved
4 in what we were doing. And, you know --

10:49AM

5 THE COURT: And who do you mean by "he"?
6 Mr. Tonasut?

7 MR. BROWN: Yeah. Mr. Tonasut and also --

10:49AM

8 THE COURT: What would you point to in the Complaint
9 as an allegation that Mr. Tonasut did anything more than simply
10 engage in a loan, as Mr. Hickman has described?

11 MR. BROWN: In the Complaint?

12 THE COURT: Yes.

13 MR. BROWN: I don't have it in front of me. Sorry.

14 THE COURT: Okay.

10:49AM

15 MR. BROWN: I know it's on the page -- because
16 they're in -- they're in -- it will say February 1st, 2022.

17 THE COURT: Yeah. So there's a timeline.

18 MR. BROWN: There's a timeline, yes. And so I
19 believe that's the last fact that I have on there.

10:49AM

20 THE COURT: Okay. The timeline says, "On
21 February 1st, 2022, Steve Weera Tonasut Trust acquired a
22 15 percent undivided interest in the plaintiff's property for
23 \$100,000 together with an agreement to delay interest payments
24 on the \$179,000 deed of trust until December 1st, 2023. And so
25 Mr. Hickman's argument is that all that shows is a loan. That

10:50AM

1 doesn't show anything that is like an investment contract.

2 MR. BROWN: Well, I would say that the -- the
3 argument against that is that in *Howey*, you know, their -- the
4 investment interest, even in those, don't have to be -- and
10:50AM 5 we're talking about investment contracts. You know, he's
6 referring to a security. We -- you know, first thing is: Is
7 this an investment contract before you even get to -- I mean,
8 it makes it a security but --

9 THE COURT: Right. And he's saying this is not an
10:50AM 10 investment contract. This is just a loan.

11 MR. BROWN: Yeah. And the argument is that, you
12 know, I was -- it was a common enterprise in respect to that.
13 I was the person and it's documented in the documents that he
14 had submitted, operating agreement, in addition to the fact
10:50AM 15 that the -- the lender -- lender, Weera, could foreclose on the
16 property, obviously, but he chose to buy 15 percent and then I
17 used the 15 percent to pursue the project.

18 There -- the other element of that is that, even
19 though that, um, the -- you know, it was recorded as public
10:51AM 20 record, you take the transaction as a whole. I mean, that's
21 what we were -- the development project was the investment
22 contract.

23 And so as to the other elements, you know, there's
24 also those. There's an investment of money. Everyone -- I put
10:51AM 25 10,000 as stated in the thing. Actually, I put more than that

1 but just to keep the facts clear for that transaction.

2 So everyone invested in this common enterprise to
3 get this solar field. The person who was responsible for it
4 was me. And, you know, it -- it doesn't matter what the -- I
10:52AM 5 feel, you know, that -- that there are -- you know, just come
6 out and say this is an investment contract.

7 THE COURT: I'm sorry. The last part?

8 MR. BROWN: I'm saying that just like -- the
9 investment contract is a judicially created concept, you know,
10:52AM 10 via Congress. And so that's something that is interpretation,
11 but I feel that all of the elements are met.

12 THE COURT: Okay. And can you address -- the
13 tentative on this -- on this case didn't address it, but the
14 tentative on the Smead case addressed it and I will let you
10:52AM 15 address it at that point, but in case it was helpful to you
16 here.

17 In the Smead case, we talked -- the tentative
18 discusses the idea that a simple loan under the family
19 resemblance test is not a security.

10:53AM 20 So I did just -- in light of the argument that
21 Mr. Hickman has made with respect to Mr. Tonasut -- and I
22 understand that it's your reading that the -- under -- applying
23 the *Howey* test, the Tonasut portion of the relationship does
24 constitute an investment contract. I did want to give you a
10:53AM 25 chance to respond on the -- the idea of applying the family

1 resemblance test.

2 MR. BROWN: Well, I mean, on those two, if you
3 look -- I believe in the SEC or its legislation, 1933, it says
4 that any note is a -- is assumed to be a security. Then
10:53AM 5 there's a nine-month exception and, you know, all this kind of
6 stuff.

7 But with *Reves*, what I -- from how I interpret it is
8 that, you know, you make the assumption that every note is a
9 security and then go from there. Unless it has that nine-month
10:54AM 10 exception and a few other things.

11 And so what -- when we say "deed of trust" and we
12 say -- I mean, "notes," those are terms that the Congress put
13 in there and doesn't necessarily mean what it says -- you know,
14 what it says as far as the investment contract because you
10:54AM 15 could call a note, like saying I'm holding paper, but yet
16 you're actually -- it's an investment contract because of a
17 series of events or how the transaction transpired.

18 And so I don't think that this has -- you know, from
19 my understanding, the closer the resemblance of a -- banned
10:54AM 20 ones were actually more -- like, less likely made it a
21 security. And so for me, this is -- it's not, um -- it doesn't
22 meet that test because there's four components of that and --

23 THE COURT: It doesn't meet the *Howey* test.

24 MR. BROWN: No. The *Reves*. The *Reves*.

10:55AM 25 THE COURT: Okay. The family resemblance test.

1 MR. BROWN: Yes.

2 THE COURT: Okay.

3 MR. BROWN: Because there's four factors there. And
4 I don't know if you want me to go through them.

10:55AM 5 THE COURT: No. That's okay.

6 Okay. Anything further from you, Mr. Brown, on this
7 case?

8 MR. BROWN: Um, yeah, I just want to, you know,
9 reiterate what an investment contract is. And this is, you
10 know -- someone invests their money in a common enterprise and
11 it's led to profits expected -- excuse me -- profits solely
12 from the efforts of the promoter in this case -- in this count,
13 the plaintiff.

14 There's also the -- you know, the Ninth Circuit has
10:55AM 15 expanded that a little bit with commonality, I believe vertical
16 commonality. You know, this -- this money was actually pooled
17 all together, you know, from the beginning. So I think that --
18 that it meets that test of the money that was -- that was
19 pooled together.

10:56AM 20 And then there was additional money that was put
21 into the project as well, via the purchase or sale of the
22 additional 15 percent that was actually from the plaintiff's
23 share.

24 And then, lastly, I would ask the Court if, in fact,
10:56AM 25 that this is an investment contract, then that is a violation

1 of federal securities law under *Slack*, 2023. The Court said
2 that any unregistered securities is -- is illegal. And so we
3 want to make it legal.

4 You know, the investment contract should be
10:56AM 5 registered if it is, in fact, registered. And that could be
6 something that is apart from the 1934 violation because the
7 violation is in regards to 1933 and 1934. So that's what I
8 would ask the Court.

9 THE COURT: And is that in your Complaint?

10:57AM 10 MR. BROWN: I -- I believe in the Prayer for Relief,
11 I did put 77. And I didn't put -- I'm sorry I don't have that
12 in front of me. I have everything else.

13 But, no, I believe it was under the Prayer for
14 Relief or my -- the -- the assumption was that when it's -- I
10:57AM 15 mean, maybe I did not say that correctly. But I did put that
16 if it is, in fact, an investment contract, then that's a
17 security and that's what needs to be fixed.

18 THE COURT: Okay. Thank you.

19 MR. BROWN: Thank you.

10:57AM 20 THE COURT: Anything further, Mr. Hickman? Briefly?

21 MR. HICKMAN: Briefly, Your Honor.

22 THE COURT: Thank you. I appreciate it. Please be
23 brief because we do have the two other matters.

24 MR. HICKMAN: Briefness.

10:58AM 25 The note. Congress says a note can be a federal

1 security, but Congress is looking at and the case law shows
2 it's fractionalized interests of notes that are sold to
3 investors. None of these notes are that.

4 These notes were issued by Atlas, LLC, and Brown,
10:58AM 5 issued by Atlas, LLC, and Brown. And they were not bought by
6 Atlas, LLC, or Brown. No one is alleged to have bought
7 interest in these notes. And so they're not, as a note,
8 federally regulated securities and there's no violation here in
9 these notes.

10:58AM 10 THE COURT: So you would agree, with respect to
11 Mr. Tonasut, that -- your argument would be that at least the
12 Tonasut's relationship is under the family resemblance test,
13 not a security because it's akin to a normal mortgage contract.

14 MR. HICKMAN: Correct, Your Honor.

10:59AM 15 THE COURT: Okay. Anything further?

16 MR. HICKMAN: I believe the same holds true for what
17 is here on Assentato.

18 THE COURT: Understood. And I think you appreciate
19 the Court's skepticism with respect to that, but I understand
10:59AM 20 the argument.

21 MR. HICKMAN: Investment contract for profits, none
22 of these allegations pertain to that. These are notes with --
23 not based on profits to be repaid by Brown or anyone but notes
24 for a certain amount of money to be repaid at a certain rate.
10:59AM 25 These are not investment contract notes.

1 THE COURT: Understood. Thank you.

2 Okay. That matter is submitted. The Court will
3 issue an order on it.

10:59AM

4 And let's have the parties on the Taylor matter,
5 Brown versus Taylor. Counsel for Clark Taylor.

6 MR. FANG: Good morning, Your Honor. Jonathan Fang
7 on behalf of Clark Taylor.

8 THE COURT: Thank you.

11:00AM

9 Okay. So, Mr. Fang, I trust you received the
10 Court's tentative?

11 MR. FANG: Yes, Your Honor.

11:00AM

12 THE COURT: Okay. And, Mr. Brown, since this is
13 your motion, I will let you be heard first. And, again, I
14 thank you for your patience with respect to when the Court was
15 able to put this matter on calendar.

16 MR. BROWN: Thank you, Your Honor.

11:00AM

17 FRCP 1 states that these rules should be construed
18 to secure a just, speedy, and inexpensive determination of
19 every action in every proceeding in Federal Court. This is an
20 action and proceeding in Federal Court.

21 This matter having been before the Court on
22 December 17th, 2022, is a Fifth Amendment takings claim under
23 42 U.S.C. --

24 THE REPORTER: Excuse me. Please slow down.

11:00AM

25 MR. BROWN: Okay. Sorry.

1 This matter is coming before this Court as a Fifth
2 Amendment takings claims -- is that better? -- under 42 U.S.C.
3 against the Los Angeles County Department of Planning is before
4 this Court today to ask for a mandatory preliminary injunction
11:01AM 5 pursuant to FRCP 65, to violate the violation of Fifth
6 Amendment rights, plaintiff's Fifth Amendment rights.

7 THE COURT: I'm just going to ask you, Mr. Brown,
8 for the sake of the reporter and myself, if you could just slow
9 down just a little bit.

11:01AM 10 MR. BROWN: Oh, okay.

11 The plaintiff acknowledges that the Government has
12 every right to take property as a function of its sovereignty
13 for the public. But that right is conditioned on just
14 compensation and, thus, there can be no taking without just
11:01AM 15 compensation.

16 The question the plaintiff brings before this Court
17 is: Should a mandatory injunction be granted in this case?
18 The answer is quite clear that it should be based on the
19 undisputed facts in this case, which makes this a pure and
11:01AM 20 simple question of law.

21 It's undisputed that the plaintiff brings an inverse
22 condemnation action against the Government for denying the
23 plaintiff's application to install a solar farm on his vacant
24 land in unincorporated Los Angeles County, in violation of the
11:02AM 25 takings clause.

1 It's undisputed that the defendant has taken the
2 position, the Government -- and I quote from docket -- ECF 43,
3 page 4, lines 12 and 13, quote, "The County has the right to
4 prohibit the construction of residential and commercial
11:02AM 5 structures upon the property."

6 It is undisputed, as I said, that the Government
7 does, in fact, have this power. But the Government must, in
8 fact, provide just compensation to exercise that right.

9 THE COURT: Sorry. Mr. Brown, can you point me to
11:02AM 10 where you were reading from? You said ECF which?

11 MR. BROWN: ECF 43, page 4, lines 12 and 13.

12 THE COURT: And that is the original opposition?

13 MR. BROWN: No.

14 THE COURT: Okay. What is that document?

11:03AM 15 MR. BROWN: That document is from another opposition
16 for the, I think, deposit of the interest.

17 THE COURT: Okay. I'm going to look for that.

18 I was focused on the motion which was at ECF 65, the
19 opposition which was at ECF 71, and the reply which was at
11:03AM 20 ECF 72. But I will look for this other document.

21 MR. BROWN: Well, it's also in ECF 60 -- or is it --
22 in the reply as well.

23 THE COURT: Okay. Can you point me to where it is
24 there?

11:03AM 25 MR. BROWN: Yeah. It's -- it should be 65. It's on

1 the first page.

2 THE COURT: Of the reply or the refiled third
3 motion?

4 MR. BROWN: The reply.

11:03AM 5 THE COURT: Okay.

6 MR. BROWN: Um, I have that in a footnote. I'm
7 sorry. And actually, that could be in ECF 63. I'm sorry.
8 That's for -- because that was the proposed order that I did
9 submit.

11:04AM 10 THE COURT: Okay. I guess maybe this is a different
11 way of getting at it. You've indicated that this is a pure
12 question of law.

13 I guess I thought I heard you say that you agree
14 that the City has the right that it has to bar any structures
11:04AM 15 on the property and your contention is just that they must
16 provide compensation. Is that what you were contending?

17 MR. BROWN: Yeah. As a sovereign, the public -- for
18 public use, the Government has the right. I mean, that's a
19 basic fundamental principle, that the Government -- and you
11:05AM 20 have to look at *Lutheran*, which is also in Los Angeles County.
21 Even if it was a temporary taking, that compensation is due.

22 And so that was the -- that's a question.

23 THE COURT: Okay. And then can you address the
24 arguments made by Mr. Taylor that this is not a taking where
11:05AM 25 compensation is due if you had notice of these limitations in

1 advance of your purchase? Can you address that argument?

2 MR. BROWN: Well, I did address that in -- if -- in
3 a reply. I think it's 55, Docket 55. It's also in the -- it's
4 in the proposed order, ECF 63. Yes, I can do that.

11:05AM

5 You know, the -- the opposition -- they cite
6 *Penn Central* as their central claim and *Lingle*. In
7 *Penn Central*, if you -- if you look at a footnote, 118 I think
8 it is -- let me make sure I get it correct for you guys.

11:06AM

9 There was -- that case is totally different because
10 we're talking about Grand Central Station and we're talking
11 about a historical, you know, landmark legislation that had at
12 least three ways and a procedure to correct the alleged
13 violation as far as them wanting to use the air rights.

11:06AM

14 And they did say that -- in this that there was --
15 if, in fact, that all economic activity -- because these are
16 folks that they own buildings around it too. So they were
17 taking this as a whole, like, okay, you guys can, like, you
18 know -- you'll be just fine if you don't get the air rights.
19 They said reasonable restrictions. That's one -- 109, Note 5,
20 in *Penn Central*.

11:07AM

21 THE COURT: And so, Mr. Brown, do you -- I'm not
22 clear on -- do you disagree that -- assuming you were aware of
23 the limitation in advance of your purchase, that that would
24 mean that the prohibition is not a taking? Do you disagree?

11:07AM

25 MR. BROWN: I disagree with that. I mean, I --

1 THE COURT: Okay. And on what basis?

2 MR. BROWN: I know in *Lucas*, you know, there was all
3 that regulation. And, you know, the Supreme Court had that
4 caveat of, well, okay, if -- if -- you know, it was in the
11:07AM 5 title before.

6 But one thing about *Knick* -- and I think that's
7 really where everything stands upon of how this law has
8 changed -- is that, you know, it establishes that -- the
9 federal Constitution says what property rights are in light of
11:07AM 10 state law. But a state or county cannot put on a limitation
11 and appropriate property and then just say that it is.

12 THE COURT: And so do you -- so if I -- I just want
13 to make sure I understand you correctly. It sounds like you
14 acknowledge that under *Lucas*, if you were aware of the
11:08AM 15 restriction prior to your purchase, that would not be a taking.
16 But you believe that *Knick* has changed that -- the state of the
17 law with respect to that issue?

18 MR. BROWN: Yeah. And *Lucas* was --

19 THE COURT: Do I have you correct?

11:08AM 20 MR. BROWN: Yes. Yes, pretty much. Yeah.

21 THE COURT: Okay. Okay.

22 MR. BROWN: And I think in addition to that, if you
23 look at *Tyler* -- and now that we have these cases that are
24 coming before -- in the 42 U.S.C. 1983, *Tyler* made -- I think
11:08AM 25 made clear that, once you have a plausibility of a complaint,

1 that there has been a taking and just compensation is due.
2 That's on page -- that's *Tyler* opinion -- I just wrote it down
3 this morning. I'm sorry.

4 If the Court needs a post briefing, I can --

11:09AM

5 THE COURT: No. That's fine. We can find it.

6 MR. BROWN: But there's two things because what
7 *Tyler* is saying is that -- I think, is that, you know, these
8 cases are -- I mean, some of them are not cut and dry, some
9 are. But when there's been a taking, that's when the
10 compensation is due. There can't be a taking without
11 compensation.

11:09AM

12 And in this case, if -- and I think *Tyler* applies
13 too if I end up losing the property because this is about --
14 this is about preliminary injunction, you know -- then the
15 County will possess the property. They can choose to sell the
16 property or not sell the property. They can choose to remove
17 that regulation easily.

11:09AM

18 It's noted in the -- it's in Docket 44, note --
19 or -- it's -- it's the -- ECF 63 is probably the best thing to
20 look at because that's the proposed order so it's like the
21 opposite of one -- but it does tell you, it says "can." It
22 doesn't say -- they're saying that they have to. And then
23 they're saying they will prohibit anything.

11:10AM

24 And so what I'm getting at is that if, in fact, that
25 they do take it, it seems like I'll be entitled to interest,

11:10AM

1 the excess value, from *Tyler*, if -- you know, if I follow the
2 procedure, if they have a procedure. I don't know what it is.

3 Now, it's not going to be at a price that I can
4 utilize the land because I -- you know, because the plaintiff
11:10AM 5 can't use it. I mean, the basics of, you know, law -- of
6 property law especially is who you can keep out and let in,
7 basically.

8 THE COURT: Can you address the question of
9 irreparable harm?

11:11AM 10 MR. BROWN: Yes. And I wanted to -- if I could go
11 quickly through the four factors. Is that cool?

12 THE COURT: Yeah. That's fine.

13 MR. BROWN: Okay. So that's what I was going to get
14 to.

11:11AM 15 So the irreparable harm part. You know, we're
16 talking about that the -- you know, when -- when a -- let's
17 see. What's the second one here? Oh, yeah. When a land use
18 regulation does not substantially advance the legitimacy
19 interests or denies an owner all economically viable use of the
11:11AM 20 land, this is a per se taking, as we said in *Lucas*.

21 The irreparable harm about land is that land is
22 unique. There is no other piece of land that is the same --
23 that this courthouse is on or my property is on or whoever's
24 property. Each property is unique.

11:12AM 25 And, you know, there really -- the authority for

1 that is -- I mean, could be common law, could be common sense,
2 it could be the Constitution. You know, I don't even -- you
3 know, no citation is needed is what I would say.

11:12AM 4 Anytime there's a harm with your property, that's
5 irreparable.

6 And I would say that the additional harm here is
7 that the County has continued to harm, 37 -- I received a
8 \$37,414 lawn mowing tax bill. And I'd just like to note that's
9 half of the -- Census Bureau just came September 12th, 2023.

11:12AM 10 The median income in the United States is 74,828.

11 So -- and I used to mow lawns as my first job. So
12 if they want to pay me to mow my lawn, I'll save the taxpayers
13 money.

14 That is a tax. They said that it was taxed. They
11:13AM 15 said that, then, if that tax doesn't get paid, which I'm not
16 paying it, then that goes to your personal tax liability.

17 And so this -- I don't -- and if you look at the --
18 you know, and I -- and I submitted it under -- you know, I wish
19 opposing counsel would confirm the validity of that document
11:13AM 20 because it is valid. It is -- but, you know, there's other
21 ways that we can figure that out.

22 THE COURT: I'm sorry. Which document?

23 MR. BROWN: The document -- the tax -- the mowing --
24 the weed maintenance letter.

11:13AM 25 THE COURT: Okay. What we refer to as the nuisance

1 letter?

2 MR. BROWN: Yeah. The nuisance letter, yes.

3 THE COURT: Okay. Thank you.

4 MR. BROWN: And so that is another -- I mean, so we
11:14AM 5 have that. Um, you know, losing the property, that's one
6 thing.

7 I mean, another thing is that they've already
8 flat-out said that they'll prohibit any structure, even though
9 they -- they can choose not to. So the harm here, too, is
11:14AM 10 that, once they get property, then, you know, they could sell
11 it to whoever, you know, or keep it and maybe possibly I would
12 get the excess, you know, because of *Tyler*.

13 So the property is just there.

14 Also, again, another \$40,000 tax bill in the mail.
11:14AM 15 So it's like \$70,000-some in taxes. And, you know, what are
16 you supposed to do with that?

17 So I think a right to land is -- and this goes back
18 to the 1800s. 1823, in the *Green v. Biddle* case, and this was,
19 you know, prior to the -- you know, the statute they were
11:15AM 20 talking about, you know, 42 U.S.C. But it's about the
21 Constitution, you know. The right to land essentially implies
22 a right to the profits from it since, without the latter, the
23 former can be no value. Thus, a devise of the profits of land
24 or even a grant of them will pass a right to the land itself.

11:15AM 25 They have everything but title, but they do have

1 title. There's no difference. The -- their claim is that, oh,
2 we can just take someone's -- someone's constitutional right
3 that -- that maybe another owner gave us, has said that, and
4 then just pass that on to the next. And then we'll decide
11:15AM 5 whenever we decide to, you know -- to let that go.

6 And with the solar facility, you know, what I tried
7 to do, because I'm in solar, is to -- these are temporary
8 structures. These aren't -- I mean, the IRS doesn't even
9 consider this a structure for depreciation. And the way that
11:16AM 10 the tax system works, that is, you know, in solar.

11 So even going in the middle and then -- you know, it
12 was one of the arguments, is it's not a structure but failed --
13 it's clear that it's fruitless. There's -- there's nothing
14 that they have told me that I could do to that land except pay
11:16AM 15 taxes and a \$37,000 lawn mowing bill that I had a week notice.

16 So I think that -- my thing is what more
17 irreparable -- I mean, what's down the line, you know? And so
18 that, to me, is irreparable harm because I can't do anything to
19 my property, if that answers the question.

11:16AM 20 THE COURT: Thank you.

21 Okay. Did you have anything else you wanted to
22 share before I turn to Mr. Fang?

23 MR. BROWN: I just -- if I could just address the
24 other two real quick, just --

11:17AM 25 THE COURT: Yes.

1 MR. BROWN: Irreparable harm is there that I had
2 just mentioned.

3 The -- not No. 2, sorry. 3, the balance of
4 equities. And I really do think they tip strongly in the
5 plaintiff's favor.

11:17AM

6 The Government has unlimited resources, multitude of
7 lawyers. I think they have 12 lawyers on this case, you know,
8 to ride this action out until there's nonpayment of taxes or,
9 you know, now auction block was, you know, mentioned.

11:17AM

10 And I think, fourthly, that this -- this will prove
11 to be a favorable judgment down the line? Well, yeah, maybe if
12 I'm able to succeed in this taking claim, yeah, I get the money
13 that I'm entitled to under the Constitution. But in the
14 meantime, you know, the irreparable harm is I can't use my
15 property.

11:18AM

16 And then, lastly, with the public, you know, I think
17 the public interest is really important here because, like I
18 mentioned, they have 12 lawyers on there. They have 300
19 lawyers down there at the County and they had to hire an
20 outside firm against me. I'm not saying that I'm all that
21 good, but I'm just saying that, like, you know, this costs the
22 public money, and especially as -- if you see that the interest
23 rates have went up.

11:18AM

24 And so my thing is I want to meet in the middle and
25 be reasonable, but they're not trying to be reasonable.

11:18AM

1 And so I have to do something to my property. And
2 so like I said, you know, I have to do what's right for me.

3 And so I think those four elements have been met.
4 And thank you, Your Honor.

11:18AM 5 THE COURT: Thank you. I appreciate it.

6 Okay. Mr. Fang.

7 MR. FANG: Good morning, Your Honor.

8 THE COURT: Good morning.

9 MR. FANG: I think it's very simple, as your
11:19AM 10 tentative laid out. Plaintiff cannot prove with admissible
11 evidence that he did not know that there was an SEA designation
12 that blocked solar farms. He's trying to kind of dance around
13 the fact that, um, when he bought the property, there's
14 evidence that there was SEA designation through the public, but
11:19AM 15 he also has notice of this as well.

16 In the separate case that's also related, in the
17 Assentato, he claims that -- let me see -- he states that he
18 purchased the property on December 18th, 2020. Prior to that,
19 it also states that the operating agreement between him and
11:20AM 20 Assentato would go towards the --

21 MR. BROWN: Excuse me, Your Honor. Is this allowed?

22 THE COURT: I'm sorry. Just a moment. Yes?

23 MR. BROWN: Is this an objection that's allowed to
24 cross to another case?

11:20AM 25 THE COURT: No. You can respond when I turn back to

1 you. Thank you.

2 MR. FANG: It shows evidence, he says, that the
3 purpose --

4 THE COURT: I'm sorry. Just to be clear, I don't
11:20AM 5 think there's anything improper about Mr. Fang pointing to
6 something that has been publicly filed, which is, I'm assuming,
7 what he's doing.

8 MR. FANG: Yes, Your Honor.

9 THE COURT: Okay. But I will give you a chance to
11:20AM 10 respond to it, Mr. Brown.

11 MR. FANG: Right. I'm referring to the Complaint in
12 the Assentato case.

13 It says on October 22nd, 2020, they entered into an
14 operating agreement that stated the primary purpose of the
11:20AM 15 partnership was to provide capital for the entitlement and the
16 re-zoning of the property located at 27250 Agoura Road.

17 He was already aware of the fact that there was a
18 prohibition against solar farms. It shows here that, you know,
19 they wanted to re-zone the property so it would be allowed to
11:21AM 20 have solar farms.

21 So I just wanted to point that out.

22 Like the Court said, there's no evidence that --
23 even if assuming the -- the SEA designation was made after,
24 that there's no economic viability of his property, other than
11:21AM 25 his own self-serving assertions, there's no proof or admissible

1 evidence showing that the property can't be used in any other
2 manner but --

3 THE COURT: I'm going to stop you right there,
4 Mr. Fang, because I thought that the County is also of the view
11:21AM 5 that he is prohibited from putting any structure on the
6 property.

7 MR. FANG: No. I believe the title said the County
8 can restrict any, but it doesn't say that it does restrict.
9 And then the restrictions are through the public ordinances
11:22AM 10 and -- and, like, for example, the SEA restriction against the
11 solar farm.

12 THE COURT: Okay. So if I understand you correctly,
13 as I wrote it in the tentative, my understanding was that there
14 were two bases upon which Mr. Brown could allege a taking. One
11:22AM 15 was the SEA designation, and the other was the County's right
16 to prohibit any use.

17 But if I now understand you now correctly -- and I
18 will also confirm with Mr. Brown -- your position is that the
19 County has this sort of baseline ability to prohibit a use and
11:22AM 20 it does that via zoning and the regulations. And in this case,
21 it did it through the SEA designation. So they're not two
22 separate prohibitions.

23 MR. FANG: Right.

24 THE COURT: Okay. And so your contention is that he
11:22AM 25 hasn't shown that he has been prohibited from doing anything

1 besides building a solar farm.

2 MR. FANG: Right. And also what Your Honor also
3 mentioned, even if the -- it was a blanket restriction, he
4 hasn't proven that the restriction was not made through any
11:23AM 5 other common law or other reasons.

6 THE COURT: Okay. But now that's kind of like -- I
7 see it as a little bit of a hypothetical situation that we're
8 not facing because the only restriction that you claim
9 currently applies is the SEA designation.

11:23AM 10 MR. FANG: I'm not claiming that's the only
11 restriction.

12 THE COURT: Okay.

13 MR. FANG: But that's the only restriction that --
14 that has been brought to matter --

11:23AM 15 THE COURT: Okay.

16 MR. FANG: -- at this time, Your Honor.

17 THE COURT: Understood. Okay.

18 Anything further?

19 MR. FANG: No, Your Honor.

11:23AM 20 THE COURT: Okay. Thank you.

21 Mr. Brown.

22 MR. BROWN: Thank you, Your Honor.

23 The public record shows and that -- showed multiple
24 times that do -- not just a solar field on this property but
11:24AM 25 there's been other things, but --

1 THE COURT: And is that in your Complaint?

2 MR. BROWN: No. So I just -- yeah, what also was in
3 the Complaint that they now say they can but in the briefings,
4 ECF 63, twice, they said that they have the right.

11:24AM 5 So this is new information to me that now, oh, I
6 mean, if you read the language, yeah, it says "can." I mean,
7 that's -- but there's never been any -- well, they've always
8 said what they said in court here, you cannot put structures.

9 THE COURT: Okay. I think I understand the parties'
11:24AM 10 argument. And so this matter is taken under submission.

11 And we will hear from the parties on the Smead
12 matter. Thank you.

13 MR. BROWN: Thank you.

14 MR. FANG: Thank you, Your Honor.

11:24AM 15 THE COURT: Okay. And so is Mr. Smead himself
16 present in the courtroom?

17 Okay. Thank you, Mr. Smead. And then --

18 Okay. Mr. Smead, I will allow you just -- just so
19 that we can sort of work out this housekeeping, maybe you can
11:25AM 20 take the podium briefly. I just wanted to -- and I'm only
21 doing that so that we can all hear you through the microphone.

22 So -- and when I stated this before, it was not on
23 the record so I do want the record to be clear. The Court was
24 made aware this morning of a late request by your attorney to
11:25AM 25 appear via Zoom. The Court -- this Court's procedures are that

1 any requests by -- for an appearance via Zoom must be made the
2 Friday before and counsel needs to meet and confer with the
3 other side and indicate what the other side's view is on the
4 request for Zoom.

11:25AM 5 And so when I -- when I looked at the Zoom request
6 this morning, it was, first of all, late and, second of all,
7 did not indicate that your attorney had spoken with Mr. Brown.
8 So we didn't grant the request.

9 However, my clerk advised me that he spoke with you
11:26AM 10 and you indicated that your attorney was downstairs, he
11 believed he had COVID and wasn't sure how to proceed.

12 And so I advised the clerk to reach out to your
13 attorney via e-mail to let him know that, under the
14 circumstances, the Court would grant the late Zoom request
11:26AM 15 because we did not want somebody who suspects that they have
16 COVID to come into the courthouse or the courtroom.

17 But my clerk has advised me that it does not appear
18 that Mr. -- your attorney, Mr. Young, is on the Zoom. So I
19 don't know if you're able to shed any light on what happened or
11:26AM 20 where Mr. Young is at the time -- now.

21 MR. SMEAD: Yes, Your Honor, I can --

22 THE COURT: Okay. Thank you.

23 MR. SMEAD: -- shed some light on the circumstance.
24 Yesterday, he got the diagnosis.

11:26AM 25 THE COURT: Okay.

1 MR. SMEAD: So I spoke with him and said, well, what
2 do you want to do? And he said, well, I'm going to attempt to,
3 you know, do it via Zoom. And I said, well, I don't think
4 you've got enough time at this point, even though you only knew
11:27AM 5 yesterday that, you know, he was --

6 THE COURT: And something I should say for the
7 record, because I think this is important, the Zoom request did
8 not indicate that counsel had COVID.

9 MR. SMEAD: Oh.

11:27AM 10 THE COURT: So the Court would have -- had that
11 happened, the Court would have handled this very differently.
12 All the request said was that counsel was requesting to appear
13 via Zoom. Because it was late and because he didn't consult
14 with Mr. Brown and there didn't seem to be any emergency and
11:27AM 15 his address, we could see, was local, that's why we didn't
16 grant it.

17 MR. SMEAD: I understand.

18 THE COURT: Yes. Okay.

19 MR. SMEAD: That was apparently a failure on his
11:27AM 20 part, more specific in his --

21 THE COURT: Request, yeah.

22 MR. SMEAD: -- his request.

23 So I told him that I would come down for this
24 hearing and that he could -- if he didn't hear from the Court,
11:27AM 25 that he could probably just do an audio connection.

1 Now, I don't know if that's still possible, if he
2 has a phone. Can you call his phone and talk to him and --

3 THE COURT: I guess my concern is he hasn't
4 responded to the e-mail that we sent.

11:28AM 5 MR. SMEAD: He's here.

6 THE COURT: He's where?

7 MR. SMEAD: He's here.

8 THE COURT: What are you pointing to?

9 MR. SMEAD: Well, downstairs or someplace. He --
11:28AM 10 they told him to not come in the courtroom.

11 THE COURT: Does he not have access to his e-mail on
12 his phone?

13 MR. SMEAD: I don't know, Your Honor.

14 THE COURT: Okay. So let's take a brief recess.

11:28AM 15 We've already gone quite long. Let's take a brief five-minute
16 recess.

17 This was what I was trying to avoid, by telling you
18 this before we started the hearing an hour ago, because I
19 didn't want there to be any confusion. But I'm willing to take
11:28AM 20 a five-minute recess for you to attempt to reach him by phone
21 so that he will look at his e-mail and get on the Zoom via his
22 phone.

23 Mr. Brown? Yes.

24 MR. BROWN: I just -- on the record that both
11:28AM 25 parties did waive oral argument, just so you know.

1 THE COURT: Okay. Thank you.

2 So we'll take a five-minute recess, and you'll try
3 to reach your attorney.

4 MR. SMEAD: Sure.

11:29AM

5 THE COURT: Thank you.

6 THE COURTROOM DEPUTY: All rise.

7 (Break taken.)

8 THE COURT: Okay. We are back on the record. And
9 we're on the record in the Brown versus Smead matter.

11:52AM

10 And I see Mr. Smead is in the courtroom, and I
11 believe this is his counsel on the Zoom.

12 Counsel, if you could just identify yourself for the
13 record.

11:52AM

14 MR. YOUNG: Good morning, Your Honor. My name is
15 David Young. I am counsel for Steve Smead who is the defendant
16 in this case.

17 THE COURT: Okay. Thank you.

18 And I do want to thank you for accommodating this.
19 My hope was that you would be outside of the courthouse because
11:52AM 20 I don't really think it's safe for you to be in the courthouse
21 if, indeed, you have COVID. But let's just try to handle this
22 quickly.

11:52AM

23 And I also understand that the parties -- Mr. Brown
24 has advised me that the parties originally waived oral
25 argument.

1 Mr. Young, did you receive the Court's tentative
2 ruling?

3 MR. YOUNG: I -- I did, Your Honor.

4 THE COURT: Okay.

11:52AM 5 MR. YOUNG: And --

6 THE COURT: And -- and as I explained to Mr. Smead,
7 the reason why your request for Zoom was not granted was
8 because it was late and you didn't indicate that you had
9 consulted with Mr. Brown. Had your request indicated that you
10 requested the Zoom because you had COVID, we would have happily
11 granted it.

12 Do you need to be heard -- now that you've seen what
13 the Court's tentative is, do you need to be heard on the
14 motion?

11:53AM 15 MR. YOUNG: I would just like to say a few things,
16 Your Honor.

17 Your Honor, I did send an e-mail to the court clerk
18 explaining that I did have COVID. I only found out about --

19 THE COURT: Mr. -- Mr. Young -- Mr. Young, let's not
11:53AM 20 go back and forth on this. I think what the issue may be the
21 normal clerk is out, and that's why we always advise counsel to
22 send their e-mails to the chambers e-mail address.

23 So if you were e-mailing Ms. Davis directly, she is
24 out and so we wouldn't have gotten those e-mails.

11:53AM 25 MR. YOUNG: I e-mailed her yesterday.

1 THE COURT: Excuse me?

2 MR. YOUNG: Your Honor, I only found out about it
3 yesterday, and I e-mailed Ms. Davis yesterday.

11:54AM

4 THE COURT: And what I'm saying is that if you
5 e-mail Ms. Davis directly and she doesn't happen to be here, we
6 don't get those e-mails. So in the future, if you need to
7 reach the Court, you need to e-mail the chambers e-mail address
8 that is on my website.

9 MR. YOUNG: All right.

11:54AM

10 THE COURT: Okay. So.

11 MR. YOUNG: Thank you, Your Honor.

12 THE COURT: Thank you.

13 Do you need to be heard on the motion?

11:54AM

14 MR. YOUNG: Only one thing, Your Honor, perhaps on
15 the emphasis on things. I'm sure that they're -- from what
16 I've heard, the issue of what is a security has been crashed
17 over again and again.

11:54AM

18 What I would like to ask the Court to consider is
19 the injuries that Mr. Brown is complaining about. They are not
20 securities laws injuries. They are something outside of them.
21 They are injuries that are basically common law, either breach
22 of tort -- tort, breach of contract, breach of fiduciary duty,
23 but not injuries that the securities laws were enacted in order
24 to -- in order -- in order to redress wrong.

11:55AM

25 And it seems to me that is a fundamental flaw of

1 Mr. Brown's case. And I would ask the Court to just think
2 about that for a short time and take that into consideration in
3 issuing its final ruling.

11:55AM 4 THE COURT: But you would agree I don't need to
5 reach the injury issue if I find that that -- the transaction
6 was not a security and you --

7 MR. YOUNG: I would agree.

8 THE COURT: The motion could be granted on that
9 basis.

11:55AM 10 MR. YOUNG: Yes, I would agree. I would agree with
11 that on the -- I would agree with that, Your Honor. If
12 Your Honor finds that this action is not a security, you do not
13 have to reach the injury issue.

14 THE COURT: Okay. Thank you.

11:56AM 15 Mr. Brown, let me let you be heard.

16 MR. BROWN: Thank you, Your Honor.

17 Congress passed the securities laws to regulate a
18 largely unregulated market. History -- this is post, you know,
19 the Great Depression. And the -- they did not create -- and I
11:56AM 20 agree -- a federal cause of action for every, you know, common
21 law that exists.

22 However, Congress did -- and the precedence has
23 shown from *SEC v. Howey* to -- I mentioned *Reves* and others that
24 what an investment contract is.

11:56AM 25 And going back to what -- and I think this --

1 addressing the four -- from the tentative ruling, the four
2 items in *Reves*, I just wanted to -- if I can address those,
3 please.

11:57AM 4 On the family resemblance, this is where I think
5 that we get caught up in the, you know, what is it called
6 and -- sorry. Let me find this real quick, wherever it went.

7 I'm sorry. I'm trying to find this.

8 Okay. I'll just go through the four parts that I
9 know.

11:58AM 10 So, first of all, it's like what was the transaction
11 about? You know, what was the purpose of it? And as alleged
12 in the Complaint, this was funding an investment opportunity --
13 investments. The only way that the plaintiff could make
14 payments or make money was for the project to be successful.

11:58AM 15 The second one on the --

16 THE COURT: Sorry. You mean the only way for the
17 defendant, Mr. Smead?

18 MR. BROWN: Sorry. The only way that the plaintiff
19 would -- could pay --

11:58AM 20 THE COURT: Mr. Smead.

21 MR. BROWN: Yeah. Is for -- was depending on the
22 success of the project.

23 THE COURT: Got it.

24 MR. BROWN: And that's also one of the key tenets of
11:58AM 25 *SEC* -- of *Howey* because an investment of money -- and I also

1 invested my own money -- into a common enterprise.

2 It's in the record, I mean, that we had voluminous
3 exchanges. And even though there may not have been a -- an --
4 a so-called recorded interest, maybe, you know -- and *Howey's*
11:59AM 5 immaterial if they're written or it's -- part of a bigger
6 context, undoubtedly he was part of the common enterprise.

7 And I was the person -- the plaintiff was the person
8 who was solely responsible for the developments. And the
9 so-called loans over the course of different periods, I feel it
11:59AM 10 constitutes one transaction as an investment contract because
11 of those factors.

12 I don't think it's a resemblance because, like I
13 mentioned before, the -- the note, you know -- in the
14 securities legislation, I believe it's in the -- well, both
12:00PM 15 19 -- 1933 and -34 basically mean the same. It's a little --
16 worded differently, but I think the Courts have said they're
17 the same. And both of those say about notes.

18 Well, undoubtedly when you -- your mortgage is a
19 note. And the -- they're assumed to be securities. Now, just
12:00PM 20 because it was called "deeds of trust" doesn't mean that -- it
21 was the deeds of trust, as the Court understood it. And I
22 agree that it goes to the third party, they're the person that
23 holds the trust.

24 The note, um -- he -- you could say he took the note
12:00PM 25 or I gave -- you know, that, I don't think, matters. It's not

1 the name of it. It's what happened.

2 Um, so with the family resemblance, again, I think
3 that you had to have -- it wasn't a mortgage on a home.

4 Now, I do understand that the allegation of -- of
12:00PM 5 building a home -- and I did put that in the Complaint. That
6 was ultimately -- yeah, it was a goal. The -- however, it was
7 an investment to -- well, the loan was for -- or the money, you
8 know, it was forewarned, was for that. But if I wasn't able
9 to, you know, live there or something, I'd have to sell it to,
12:01PM 10 you know, pay the -- the bill.

11 And so it wasn't -- because I understand the home
12 thing. I understand that. And -- but it wasn't -- it was a
13 development project as well. And it was in my business, with
14 what I do.

12:01PM 15 And then we have, um -- or a lien on business
16 assets. It was all in my name. The defendant wanted it in my
17 name. You know, that could be explored more. But I -- I
18 don't -- you know, I'm looking at the whole picture.

19 Plan of distribution. Well, the only way that he's
12:02PM 20 going to get the money is if I'm successful with my projects.
21 And he gave multiple extensions. And as -- in the allegation,
22 I mean, that -- you know, in the Complaint, you know, those are
23 provable facts. That's what happened.

24 I think the reasonable expectations of the investing
12:02PM 25 public is that, when you build -- you have a fiduciary -- or

1 semi-fiduciary relationship with someone who you trust and that
2 says they have more money than they know what to do with,
3 that -- and you continue to work on a project that you don't
4 think is going to be yanked from you, I think there should -- I
12:02PM 5 think federal securities laws do cover that because common law
6 and -- in the state of California -- I mean, in most states,
7 there are no alternatives for, you know, really looking at this
8 as a whole picture.

9 I mean, blue sky law is fine. But this is a very
12:03PM 10 particular, I think -- investment contracts that, you know,
11 Congress really -- you know, just like the decisions -- there's
12 many, many ways people make money and they transfer money and
13 they make these creative deals and this is one of them.

14 And so the -- this is the bigger picture is that
12:03PM 15 that's that.

16 Sorry. Lastly, I don't think another regulatory
17 body could -- could do this, could regulate this, as I
18 mentioned. You know, this arguably could be a federally
19 insured transaction, as mentioned in one of the briefs, based
12:03PM 20 on the Dodd-Frank law. However, the -- that regulatory body is
21 more concerned with, um, mortgages and this is -- these were
22 investments. And that -- that law, you know, was after the
23 2008 crisis.

24 So thinking of two different sets of laws and their
12:04PM 25 purpose, even though the 2010 added to the securities.

1 So, yeah, I think that that's what it is. You know,
2 and I feel strongly about that because of the facts. And I
3 believe that I can prove it in court.

4 THE COURT: Understood. Thank you.

12:04PM 5 MR. BROWN: Thank you.

6 THE COURT: Okay. I don't think I need to hear
7 anything further from you, Mr. Young.

8 Did you want to be heard further?

9 MR. YOUNG: No, Your Honor.

12:04PM 10 THE COURT: Okay.

11 MR. YOUNG: Um, I'll end it right now.

12 THE COURT: Okay. Thank you.

13 And I am sorry to hear that you're not well. I hope
14 that you get better soon. Please be safe, travel safely. Your
15 situation is a reminder as to why I have everyone in my
16 courtroom wear masks because COVID is still around.

17 Okay. And with that, the matter is submitted. The
18 Court will issue an order.

19 Mr. Brown, I believe this case we've also issued our
12:05PM 20 order on the IFP request, so you should be getting that as
21 well.

22 And I do want to thank the parties and especially
23 the staff for their patience this morning.

24 Okay. The Court is adjourned. Thank you.

12:05PM 25 (Proceedings concluded at 12:05 p.m.)

CERTIFICATE OF OFFICIAL REPORTER

COUNTY OF LOS ANGELES)
STATE OF CALIFORNIA)

I, MYRA L. PONCE, FEDERAL OFFICIAL REALTIME COURT REPORTER, IN AND FOR THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, DO HEREBY CERTIFY THAT PURSUANT TO SECTION 753, TITLE 28, UNITED STATES CODE THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE STENOGRAPHICALLY REPORTED PROCEEDINGS HELD IN THE ABOVE-ENTITLED MATTER AND THAT THE TRANSCRIPT PAGE FORMAT IS IN CONFORMANCE WITH THE REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES.

DATED THIS 9TH DAY OF OCTOBER, 2023.

/S/ MYRA L. PONCE

MYRA L. PONCE, CSR NO. 11544, CRR, RDR
FEDERAL OFFICIAL COURT REPORTER